Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TEXAS LOTTERY COMMISSION,
ANTHONY SADBERRY, RICHARD DALY,
JAN HART, NORA A. LINARES and LINDA CLOUD
Petitioners,

v.

SCOTT WENNER,
and
BDM ENTERPRISES, INC., also known as
HEART'S DISCOUNT LIQUOR,
Respondents.

On Petition For Writ of Certiorari to The
United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Fifth Circuit's opinion conflicts with settled Supreme Court law, *Kaiser Steel Corp. v. Mullins*, 455 U. S. 72, 76 (1982), because it refuses to recognize that a winning Texas lottery ticket purchased in violation of the Interstate Wagering Amendment to the "Violent Crime Control and Law Enforcement Act of 1994" is an illegal contract and is, therefore, unenforceable.

2. The Fifth Circuit's opinion erroneously extends a district court's preliminary injunction beyond its terms and conflicts with law in the Second, Eighth and Ninth Circuits in defining a "wrongful injunction" and in deciding that such an injunction can provide blanket immunity for all acts committed in reliance on it.

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LIST OF INTERESTED PARTIES

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CITATIONS FOR REPORTS OF LOWER COURT DECISIONS IN THIS CASE

United States District Court, Southern District of Texas, Houston Division: not reported. (Appendix, pages 14a-27a)

United States Court of Appeals for the Fifth Circuit: *Wenner v. Texas Lottery Commission*, 123 F.3d 321 (5th Cir. 1997) (Appendix, pages 1a-13a)

STATEMENT OF JURISDICTION

Course of Proceedings

The United States Court of Appeals for the Fifth Circuit entered its judgment on September 30, 1997. (Appendix, pages 1a-13a)

Petitioners' Petition for Panel Rehearing and Suggestion For Rehearing En Banc were denied on November 10, 1997. (Appendix, pp. 28a-29a)

Supreme Court's Jurisdiction

Jurisdiction is vested in the Supreme Court pursuant to 28 U.S.C. § 1254(1), this being a petition for review of a judgment entered by the United States Court of Appeals for the Fifth Circuit reversing on appeal a summary judgment in favor of Petitioners entered by the United States District Court of the Southern District of Texas (Houston Division).

STATUTE INVOLVED IN THE CASE

The Interstate Wagering Amendment of the "Violent Crime Control and Law Enforcement Act of 1994" amended 18 U.S.C. § 1301 which pertains to importing or transporting lottery tickets and provides that:

> Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or, being engaged in the business of procuring for a person in 1 State such a ticket, chance, share, or interest in a lottery, gift, enterprise or similar scheme conducted by another State (unless that business is permitted under an agreement between the States in question or appropriate authorities of those States), knowingly transmits in interstate or foreign commerce information to be used for the purpose of procuring such a ticket, chance, share, or interest; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined under this title or imprisoned not more than two years, or both.

STATEMENT OF THE CASE

Jurisdiction lies with the federal court as Respondent Wenner initially pled violations of the United States Constitution and 42 U.S.C. § 1983 in his state court petition which Petitioners correctly removed. Respondent then pled for declaratory relief under 28 U.S.C. § 2201. After the district court granted Petitioners' motion for summary judgment, Respondent Wenner sought *de novo* review by the Court of Appeals for the Fifth Circuit. At the Fifth Circuit Court, Petitioners argued that the holding of the District Court was correct -- a "preliminary injunction restraining temporarily the prosecution of a penal statue does not render the statute itself invalid or 'not in force'".

On or about November 23, 1994, Respondent Wenner entered into a transaction with Pic-A-State for its purchase of a lottery ticket for the Texas lottery. At that time, in the absence of an agreement between the States of Texas and Pennsylvania authorizing such transactions, Pic-A-State was engaged in the business of taking orders for the purchase of out-of-state lottery tickets for states, such as Texas, then transferring the purchase information through the internet from a computer in Pennsylvania to a computer in Texas for purchase of lottery tickets in Texas. Wenner's ticket was ultimately purchased from Hart's Discount Liquor store in Houston, Texas, at the time, an authorized Texas Lottery retail outlet. Pic-A-State's operations were designed to avoid pre-Interstate Wagering Amendment prohibitions against the interstate transfer of lottery tickets by keeping the tickets themselves in the state of origin and transferring only a computer-generated "receipt" to the customer. Texas lottery tickets cost $1.00 and Pic-A-State charged an additional $1.00 for its service.

Pic-A-State's operations were explicitly outlawed by the Interstate Wagering Amendment, 18 U.S.C. § 1301 (effective September 13, 1994), which closed what the Fifth Circuit recognized as a loophole in prior laws, by prohibiting and making

illegal the transmission in interstate commerce of information to be used for the purpose of procuring a lottery ticket. On September 16, 1994, Pic-A-State filed a complaint in the United States District Court for the Middle District of Pennsylvania presenting a Commerce Clause challenge to the Interstate Wagering Amendment. Pic-A-State obtained a preliminary injunction which was narrowly drawn to prohibit the criminal prosecution of Pic-A-State by the United States Attorney pending the outcome of the litigation. The Pennsylvania district court dismissed Pic-A-State's claim on February 23, 1995, and the Court of Appeals for Third Circuit affirmed the District Court. *Pic-A-State PA, Inc. v. Reno*, 76 F.3d 1294 (3rd Cir. 1996), *cert denied*, ___ U.S. ___, 116 S.Ct. 2504 (1996). Respondent Wenner contracted with Pic-a-State to purchase his Texas lottery ticket while the Pennsylvania district court's preliminary injunction was in place.

The ticket purchased by Pic-A-State for Respondent Wenner matched all six numbers drawn by the Texas Lottery Commission on November 23, 1994, and Wenner filed a claim for the grand prize of $10,000,000. Upon receipt of information of Pic-A-State's involvement in the transaction, the Texas Lottery Commission rejected Wenner's claim because his ticket was purchased in violation of state and federal law and has not paid Wenner the jackpot attributable to the draw. Wenner filed suit in state district court and Petitioners timely removed the matter to federal court.

Respondent Hearts Discount Liquor intervened in the case seeking its one percent "seller's bonus" as a result of "selling" the winning lottery ticket to Wenner.

The Houston district court found that Wenner's contract with the State of Texas was illegal and, therefore, unenforceable as a matter of law. The district court reasoned that Wenner's purchase of the ticket through Pic-A-State violated the Interstate

Wagering Amendment and that the Pennsylvania district court's preliminary injunction did not render the statute ineffective. The Court of Appeals for the Fifth Circuit reversed and remanded. The Fifth Circuit held that the preliminary injunction issued by the Pennsylvania district court suspended the Interstate Wagering Amendment, as applied to Pic-A-State, making Pic-A-State's operations under the preliminary injunction legal and, thus, obligations arising from Pic-A-State's operation were enforceable.

ARGUMENT

1. The Fifth Circuit's opinion conflicts with settled Supreme Court law, *Kaiser Steel Corp. v. Mullins*, 455 U. S. 72, 76 (1982), because it refuses to recognize that a winning Texas lottery ticket purchased in violation of the Interstate Wagering Amendment to the "Violent Crime Control and Law Enforcement Act of 1994" is an illegal contract and is, therefore, unenforceable.

This Court has made it clear that federal courts should not lend their assistance in any way towards carrying out an illegal contract. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982). The aid of the court is denied for public policy concerns without regard to the interests of the parties involved. *Id.* (citing *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 262 (1909)). It is undisputed that the Interstate Wagering Amendment was designed to and made Pic-A-State's operation illegal. Wenner bases his claim to an enforceable contract on the preliminary injunction issued by Pennsylvania federal district court in Pic-A-State's challenge to the constitutionality of the Interstate Wagering Amendment. In a case involving a contract negotiated by a government consultant between the Government and the Mississippi Valley Generating Company which violated the federal conflict of interest statute, this Court determined that vindication of public policy required non-enforcement of the contract,

regardless of the equities. *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 563 (1961).

Despite the clear statements in *Kaiser and Mississippi Valley Generating*, some circuits characterize the federal law on the enforceability of illegal contracts as inconsistent. *See*, *Resolution Trust Corp. v. Home Savings of America*, 946 F.2d 93, 96 (8th Cir. 1991). These courts apply a balancing test to determine if public policy weighs in favor of enforcement or against enforcement. Though not explicit, this seems to be the approach that the Fifth Circuit has taken in *Wenner*. In doing so, the Fifth Circuit Panel paints Respondent Wenner as an innocent victim of a state lottery that is willing to take money from Pic-A-State and then refuses to pay an unsuspecting winner. This analysis ignores several facts: Pic-A-State doubled the cost of the lottery ticket to provide its service to Wenner; Congress has restricted interstate traffic in lottery tickets for over a century; Pic-A-State was operating only because it was using technology which took advantage of a loophole in the statute; because of Pic-A-State's method of purchasing tickets, the Texas Lottery did not know it was receiving funds from Pic-A-State; as a police officer, knowledge may be imputed to Respondent Wenner that the State of Pennsylvania had been maintaining since 1991 that Pic-A-State's operations were illegal under Pennsylvania law. Kristen D. Adams, "Interstate Gambling -- Can States Stop the Run for the Border?" 44 Emory LJ 1025 (summer 1995). *Pic-A-State Pa., Inc. v. Com. of Pa.*, 42 F.3d 175, 179 (3rd Cir. 1994); *Pic-A-State PA, Inc. v. Reno*, 76 F.3d 1294 (3rd Cir. 1996). Most importantly, Congress passed the Interstate Wagering Amendment because it determined that operations like Pic-A-State were against the national interest and sound public policy. *Id.* Texas, like other states, is the intended beneficiary of the Interstate Wagering Amendment. 139 Cong. Res. § 15247. In any balancing test, a contract infected by activity which Congress has declared illegal should not be enforced.

2. The Fifth Circuit's opinion erroneously extends a district court's preliminary injunction beyond its terms and conflicts with law in the Second, Eighth and Ninth Circuits in defining a "wrongful injunction" and in deciding that such an injunction can provide blanket immunity for all acts committed in reliance on it.

The preliminary injunction issued by the Pennsylvania district court applied only to the parties before that court and stayed enforcement of the "interstate wagering" provision of the Violent Crime Control Act by the United States against Pic-A-State, its owner, and/or their officers, agents, dealers, retailers or employees, wherever located pending final adjudication of that litigation. *Pic-A-State v. Reno,* No. 94-1490 (M.D. Pa. Sept. 16, 1994), *Wenner v. Texas Lottery Commission,* 123 F.3d 321, 324 (5th Cir. 1997). The preliminary injunction did not purport to determine the merits and render the Interstate Wagering Amendment invalid or not in force. The district court in Texas held that the Texas Lottery Commission had neither a contractual nor a statutory duty to honor Respondent Wenner's ticket because the preliminary injunction which was issued by the Pennsylvania district court did not make Pic-A-State's conduct legal. *Wenner,* 123 F.2d at 324. The Fifth Circuit Panel reversed the district court, holding that a legally-issued injunction froze the status quo and, therefore, Pic-A-State's activities were legal. The Panel reasoned that an injunction that merely stopped criminal enforcement without assuring Pic-A-State that it could continue operating and assuring that its customers would have the right to benefit from any interstate winnings was against the public interest. *Id.* at 326. The Panel's interpretation places the Texas Lottery Commission in the position of having to honor a contract which was illegal everywhere else in the United States because of a preliminary injunction to which the Commission was not a party.

The extent of protection afforded by a preliminary injunction is unsettled. In *Edgar v. MITE Corp.,* 457 U.S. 624,

648 (1982) (Stevens, J. concurring in part and concurring in the judgment), Justice Stevens explained that an injunction prohibiting the Illinois Secretary of State from issuing any cease and desist orders or otherwise invoking, applying, or enforcing the Illinois Business Take-Over Act against a corporation challenging the statute's constitutionality did not provide blanket immunity for violations of the statute that occurred during its effective period. "Since a final judgment declaring a state statute unconstitutional would not grant immunity for actions taken in reliance on the court's decision, certainly a preliminary injunction--which on its face does nothing more than temporarily restrain conduct--should not accomplish that result." *Id.* at 2645.[1] Justice Marshall and Justice Brennan, in a dissenting opinion, take the opposite view, noting that "parties seek to restrain the enforcement of a state statute, not just because they want short-term protection, but because they desire permanent immunity for actions they take in reliance on the injunction." *Id.* at 2649. The majority left the question of the protection provided by a preliminary injunction unresolved.

Several courts which have dealt with the question left unanswered in *MITE* have determined that a "federal judgment, later reversed or found erroneous, is a defense to a federal prosecution for acts committed while the judgment was in effect." *Clarke v. United States*, 915 F.2d 699, 702 (D.C. Cir. 1990) discussing *United States v. Mancuso*, 139 F.2d 90 (3rd Cir.1943) and *United States v. Albertini*, 830 F.2d 985 (9th Cir. 1987). While there is an argument for this logic for criminal prosecution involving the parties to the injunction or judgment, it should not be extended to non-parties or secondary liability flowing from the illegal act. This Court has recognized in some early cases a right in the general public to restitution where public utilities have been

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[1] The Ninth Circuit relied on *MITE* in an action involving a Federal court judgment regarding a federal statute. *Farmers Union Central Exchange, Inc. v. Thomas*, 881 F. 2d 757 (9th Cir. 1989).

allowed to charge rates in excess of an enjoined rate limitation where, when the merits were decided, the rate limitation was upheld. *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U.S. 134 (1919); *Ex parte Lincoln Gas & Electric Light Co.*, 256 U.S. 512 (1921). The concept of restitution recognizes that non-parties to a preliminary injunction should get the protection they deserve from a constitutional statute or regulation, even though a preliminary injunction has temporarily interfered with enforcement.

In *Camenisch*, this Court made it clear that a party's entitlement to a preliminary injunction did not settle any question of liability on underlying legal claims. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). *Camenisch* involved an allegation that defendants were violating § 504 of the Rehabilitation Act by not paying for a sign-language interpreter for a deaf student. The district court issued a preliminary injunction requiring the University to pay for an interpreter. By the time the case reached the appellate court, the University had secured the interpreter and Camenisch had graduated. Though the injunction was moot, this Court determined that trial on the merits was necessary to determine who should pay for the interpreter. Like here, Camenisch could control the conduct of the defendants by way of injunction, but the risk of paying as a result of the relief requested depended on the outcome of litigation on the merits. *Id.*

Rule 65 of the Federal Rules of Civil Procedure requires a security bond because it recognizes that defendants need protection where injunctions are issued without full deliberation on the merits. The preliminary injunction issued in Pennsylvania alleviated Pic-A-State's risk of criminal enforcement while it was in effect, but Pic-A-State, not the State of Texas, should bear the risk of paying out amounts owing under resultant illegal contracts. The Third Circuit, whose law controls the district court that issued the injunction on which Wenner relies, recognized in *Klein v. Califano*, 586 F.2d 250, 261 (3rd Cir. 1978) that the Department of Health, Education

and Welfare would have authority to recoup medicaid funds wrongfully paid in compliance with a preliminary injunction. In the case at hand, the Fifth Circuit Panel avoided this result by disagreeing with the Texas district court's determination that the Pennsylvania district court had wrongfully issued a preliminary injunction. The Panel determined that the preliminary injunction was presumptively correct because it was issued in conformance with the law of the Third Circuit.[2]

The standard used by the Fifth Circuit Panel conflicts with the standard used by the Second Circuit. The Second Circuit has held that an injunction may have been granted without the court having abused its discretion and still be wrongful if a party has been enjoined from doing something which a decision on the merits determines it had the legal right to do. *Guzman v. Local 32B-32J*, 72 F.3d 260, 263 (2nd Cir. 1995). "The focus of the "'wrongfulness' inquiry is whether, in hindsight in light of the ultimate decision on the merits after a full hearing, the injunction should not have issued in the first instance." *Blumenthal v. Merrill Lynch*, 910 F.2d 1049, 1055 (2nd Cir. 1990), *on remand*, *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1991 WL 120287 (S.D.N.Y., Jun 27, 1991). The Ninth Circuit recently adopted this standard, holding that a party has been "wrongfully enjoined" as that term is used in Rule 65(c) when it turns out the party enjoined had the right all along to do what it was enjoined from doing. *Nintendo of America v. Lewis Galoob Toys*, 16 F.3d 1032, 1036 (9th Cir. 1994), *cert. denied*, 513 U.S. 822 (1994). In the context of a stay of a rate order issued by the Interstate

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[2] The Fifth Circuit Panel does not explain whether it is referencing the law which sets the standard for granting preliminary injunctions or whether it is referencing Third Circuit law dealing with whether Pic-a-State's activities were protected by the Interstate Commerce clause. Pic-A-State was involved in other litigation which challenged a Pennsylvania statute on Interstate Commerce clause grounds. *See, Pic-a-State Pa, Inc. v. Com. of Pa.*, 42 F.3d 175 (3rd Cir. 1994).

Commerce Commission, the Eighth Circuit recognized that a temporary restraining order is often necessary to preserve the status quo and, when the TRO is characterized as wrongful, that does not imply that the court acted improperly, but only that the party who obtained its benefit fails to prevail on the merits. *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 213, 241 f.n.4 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971). Under the standard articulated by these Circuits, the injunction issued by the Pennsylvania district court was "wrongful" because, on the merits, the district court on February 23, 1995 dismissed Pic-A-State's complaint and the Third Circuit later affirmed. *Pic-A-State v. Reno*, 76 F.3d at 1297.

The Texas Lottery Commission was not a party to the preliminary injunction issued by the Pennsylvania district court. Further, that preliminary injunction did not purport to find the Interstate Wagering Amendment unconstitutional or to render it "not in force." The Pennsylvania court's preliminary injunction was "wrongful" and cannot be used to transform a lottery ticket bought in an illegal manner into a valid, enforceable contract.

CONCLUSION

Petitioners respectfully request that this Court take jurisdiction and consider the questions raised herein by Petitioners. Pic-A State sued out a wrongful preliminary injunction. The injunction was limited to the parties before the Pennsylvania district court and did not purport to render the Interstate Wagering Amendment void or not in effect. The contract entered into by Pic-A-State on behalf of Respondent Wenner was illegal under federal statute and cannot be enforced. This Court should clarify the protection afforded by a preliminary injunction by reversing the decision of the Fifth Circuit and rendering judgment in accordance with the district court for the Southern District of Texas.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 96-21074

SCOTT WENNER,
Plaintiff-Appellant,

and

BDM ENTERPRISES, INC.,
also known as Heart's Discount Liquor,
Intervenor Plaintiff-Appellant,

v.

TEXAS LOTTERY COMMISSION,
ANTHONY SADBERRY, RICHARD DALY, JAN HART,
NORA A. LINARES, AND LINDA CLOUD
Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas

Sept. 30, 1997

Before DUHÉ and BARKSDALE, Circuit Judges, and COBB[1], District Judge.

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[1]District Judge of the Eastern District of Texas, sitting by designation.

HOWELL COBB, District Judge:

This suit arose after the Plaintiff purchased a winning Texas lottery ticket and the defendants refused to honor it. The Plaintiff filed suit in the federal district court for the Southern District of Texas asking the court to order performance. The district court granted summary judgment for the defendant on grounds that the purchase of the ticket was illegal under the Violent Crime Control and Law Enforcement Act of 1994 and therefore, the contract resulting from the purchase of the ticket was unenforceable. For reasons stated below, we disagree with the district court.

I. HISTORY AND BACKGROUND

Lotteries in various forms have been a part of the American life since colonial times. Among the beneficiaries of early colonial lotteries were such notable institutions as Harvard and Yale Universities. However, until the early 1980's, States have traditionally been suspicious of lotteries believing them to be potentially injurious to their citizens. Congress has long supported state efforts to closely regulate lotteries or ban them entirely. State attitudes toward lotteries began to change in part because of taxpayer resistance to the imposition of new taxes and state needs for new sources of revenue. A substantial majority of states have now enacted some form of state lottery. In 1992, Texas established a state lottery which is operated by the Texas Lottery Commission (TLC). This case arose when the TLC refused to honor a winning lottery ticket bought through the services of a private corporation by an out-of-state player.

Before 1994, the sale of lottery tickets in interstate commerce was controlled by: 1) 18 U.S.C. § 1084(a), which made it illegal for one engaged in the business of betting or wagering to knowingly use a wire facility for transmitting bets or wagers in interstate commerce; 2) 18 U.S.C. § 1301, which made it illegal to physically carry lottery tickets in interstate commerce; and 3) 18

U.S.C. § 1953, which made it illegal to transport wagering paraphernalia in interstate commerce. These code sections created a web which, under most circumstances, adequately protected state lottery monopolies. However, Pic-A-State, a Pennsylvania Corporation with its principal place of business in New Jersey, was able to exploit a loophole[2] in this web by creating a computer network between its agents in every lottery state and transmitting its customer's lottery ticket orders over that network. Pic-A-State's operation enabled its customers to legally purchase a chance in any lottery in the nation. Because Pic-A-State's operation potentially

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[2]The loophole allowed an entity engaged in this business to operate as follows:

Purchaser(s) in State A would "contract" with the local Pic-A-State outlet for the purchase of lottery ticket from State B.

Purchaser(s) gives Pic-A-State numbers, the cost of the ticket(s) and commission (service charge), and receives claim checks for the actual lottery tickets.

Pic-A-State, acting as an agent for Purchaser(s) gathers all orders for State B lottery tickets on a computer disk and transmits the contents of the disk to a Pic-A-State agent in State B.

Pic-A-State wires the purchase money for the tickets to its agent in State B.

Pic-A-State's agent in State B fills out the official playslips and buys the lottery tickets using money form Pic-A-State's clients in State A.

Pic-A-State's agent in State B holds the lottery tickets in State B, they never cross state lines.

If purchaser wins he claims the prize in accordance with the local lottery commission's rules. This mode of operation ensured the lottery paper never left the state, the mails were not used, and a wire facility was not used for ordering lottery tickets, hence no violation of federal law. When done correctly, the purchase transactions are totally transparent to the local lottery commission's selling agent and because all local state lottery codes and rules are followed, there were no violations of state law that could render a winning ticket invalid.

affected each state's stream of lottery revenues[3] and prevented each state from maintaining exclusive control over its lottery, the states lobbied Congress to close this loophole by amending the code.[4] On September 13, 1994, Congress enacted the Interstate Wagering Amendment as part of the "Violent Crime Control and Law Enforcement Act of 1994". This amendment closed the loophole through which Pic-A-State was operating by revising 18 U.S.C. §§ 1084, 1301, and 1953.

Pic-A-State promptly challenged the constitutionality of the Interstate Wagering Amendment in the Federal District Court for the Middle District of Pennsylvania (Pennsylvania Court). Pic-A-State also sought to enjoin the enforcement of the revised code sections until the merits of its challenge could be heard. Because, it met the dual burdens of showing irreparable harm and the probability of success on the merits the Pennsylvania Court

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[3]From the state's standpoint, the main effect of this industry was to place each of the state's lotteries in competition with each other. This was done by shifting lottery ticket revenue from a customer's state whose prizes were relatively small to a competing state whose lottery prizes had grown large because of jackpot roll-overs. From a player's perspective, it was far more attractive to purchase a chance in the lottery that has the larger prize.

A roll-over occurs when no winner emerges from the preceding drawing. In many state lotteries, the jackpot is combined with the next game's jackpot and so on until a winner is drawn.

[4]The states wanting to further exploit their lottery monopolies by entering into multi-state compacts offering multi-state games did not want competition from Pic-A-State. Further, the states realized that direct control of a Pic-A-State type of operation was either beyond their individual powers or that the resultant state codes would likely be unwieldy and potentially unenforceable thereby reducing flexibility for the states and the players. We note this to illustrate the difficulty that the states would have in trying to eliminate Pic-A-State with their own regulations. Because the district court did not reach the merits of these defenses neither do we.

enjoined the Department of Justice (DOJ) from enforcing revised code sections against Pic-A-State.

In November 1994, while the injunction was in effect, Scott Wenner bought two Texas Lottery tickets for face value plus a one-dollar per ticket service charge from a Pic-A-State outlet in Croyden, Pennsylvania. One of Wenner's tickets matched all six numbers drawn by the TLC, entitling Wenner to the grand prize of $10,000,000. Wenner promptly claimed his prize. In January, 1995, the TLC refused to honor Wenner's claim alleging violations of both federal and Texas law.

In February 1995, the Pennsylvania Court denied Pic-A-State's constitutional challenge to the Interstate Wagering Amendment and dissolved the injunction. The Third Circuit affirmed and Pic-A-State ultimately dissolved.

Wenner filed suit in the Southern District of Texas seeking a declaratory judgment that his winning ticket was valid and an order enforcing the contract arising therefrom. BDM Enterprises, which sold the actual lottery ticket, intervened seeking its one-percent seller's bonus. The TLC raised a number of defenses, most notably: 1) Wenner purchased his ticket in violation of the Interstate Wagering Amendment; 2) Wenner purchased his ticket in violation of various sections of the Texas Lottery Code; and 3) Wenner's claim against the TLC was barred by sovereign immunity.[5] Both parties moved for summary judgment.

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[5]We include the sovereign immunity defense only for the sake of completeness. The magistrate judge disallowed the TLC's attempt to raise this defense in an amended pleading and the district court issued the summary judgment on other grounds before reconsideration. The TLC raised this defense in its appellate brief claiming a "de facto" pleading of sovereign immunity. It offers no authority for the propriety of such a pleading practice, nor could we find authority for it in the Federal Rules of Civil Procedure or the case law. The district court, however, never reached this defense and neither do we.

The district court granted summary judgment in favor of the TLC. It reasoned that, despite the pendency of the injunction, Wenner's purchase of the ticket through Pic-A-State violated the Interstate Wagering Amendment and therefore the resulting contract was unenforceable. We disagree with the district court and therefore reverse and remand.

II. DISCUSSION

This Court reviews the district court's grant of summary judgment de novo. *Melton v. Teachers Insurance & Annuity Assoc. of America*, 114 F.3d 557, 559 (5th Cir.1997) (citations omitted). We view the evidence in the light most favorable to the non-movant in applying the same standard as the district court. *Hibernia Nat'l. Bank v. Carner*, 997 F.2d 94, 97 (5th Cir.1993). Summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(a). The party seeking summary judgment has the initial burden of showing that there is an absence of any genuine issue of material fact. *Celotex v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The burden then shifts to the non-moving party who must show the existence of a genuine issue of material fact. *Id.* It is incumbent on the non-moving party to bring forth facts and not merely rest on denials nor rely on the allegations within its pleadings. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256- 57, 106 S.Ct. 2505, 2514-15, 91 L.Ed.2d 202 (1986).

Consequently, a summary judgment will be vacated only if

We also take this opportunity to point out that the TLC's appellate brief was wholly inadequate. The TLC appears to have done little more than plagiarize the district court's thoughtful and well written opinion and as such never addressed the points Wenner raised on appeal.

the evidence viewed in the light most favorable to the non-movant shows a genuine issue of material fact or the moving party is not entitled to judgment as a matter of law. *Catrett*, 477 U.S. at 323, 106 S.Ct. at 2553.

The dispositive issue in this case is whether the TLC was entitled to judgment as a matter of law. There is no dispute as to the material facts. The district court held that the TLC was entitled to a judgment as a matter of law reasoning that the contract arising from Wenner's ticket is unenforceable because the purchase of the ticket violated federal law. See *Southwestern Underground Supply & Envtl. Serv., Inc. v. Amerivac, Inc.*, 894 S.W.2d 15, 18 (Tex.App.-Tyler 1982). The court reasoned that, "[A]n applicant, which procured a wrongful issuance of the temporary injunction, [cannot] claim to be absolved of its illegal activity committed during the pendency of the wrongfully issued injunction." In granting the TLC's motion for summary judgment, the district court reasoned that, "A wrongfully issued preliminary injunction restraining temporarily the prosecution of a penal statute does not render the statute itself invalid or 'not in force', ..." (emphasis added). We disagree because: 1) the Pennsylvania court issued the injunction in conformance with the law of the Third Circuit and is therefore, presumptively correct[6]; and 2) a legally issued injunction froze the status quo which existed prior to the enactment of the Interstate Wagering Amendment of the Violent Crime Control and Law Enforcement Act of 1994 therefore, maintaining the legality of Pic-A-State's activities performed while the injunction was in effect. Accordingly, the contract arising from the ticket purchase was not unenforceable because of an illegality, the TLC was not entitled to a judgment as a matter of law, and therefore, the summary judgment must be vacated.

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[6]There is no evidence in the record that the DOJ overcame or could overcome that presumption.

A. Injunction

The district court has traditionally had the equitable power to fashion any remedy necessary and appropriate to do justice in a particular case. *Hecht v. Bowles*, 321 U.S. 321, 329, 64 S.Ct. 587, 591, 88 L.Ed. 754 (1943). "The essence of equity jurisdiction has been the power of the chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity have distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between public interest and private needs...." *Id.*

The district court in contemplation of exercising its traditional equitable powers must weigh several factors to determine whether a party's request for equitable relief should be granted. *Id.* Among the factors that must be considered are: 1) the probability of irreparable damage to the moving party in the absence of relief; 2) the possibility of harm to the non-moving party if relief is granted; 3) the likelihood of success on the merits; and 4) the public interest. *United States v. Price*, 688 F.2d 204, 211 (3rd Cir.1982); *accord A.O. Smith Corp. v. F.T.C.*, 530 F.2d 515, 525-26 (3rd Cir.1976).

On September 16, 1994, the Pennsylvania Court issued a TRO barring the DOJ from enforcing revised code sections against Pic-A-State. The court issued the order after Pic-A-State made a showing of irreparable harm to its business and probable success on the merits. Ten days later, the Pennsylvania Court, after hearing the DOJ's motion to vacate and finding the circumstances and equities unchanged, issued a preliminary injunction continuing the ban against the DOJ's enforcement of the revised code sections against Pic-A-State, its agents and employees until the challenge could be heard on its merits.

In issuing a temporary injunction, the Pennsylvania District

Court specifically found that: 1) a denial of the equitable relief sought by Pic-A- State would result in irreparable damage to Pic-A-State's business; and 2) Pic-A-State was likely to succeed on the merits. It is important to note that the immediate harm asserted by Pic-A-State would have resulted from having to suspend its business to avoid criminal prosecution while awaiting the adjudication of its constitutional challenge to the Wagering Amendment.[7] We infer from the record, that because the loophole had existed for over ninety (90) years and the DOJ did not demonstrate to the court that it would be harmed by the injunction, that there was no harm to the non-moving party.[8]

Even though Pic-A-State made a credible showing that it would suffer irreparable harm in the absence of the injunction and it was likely to prevail on the merits, the Pennsylvania Court was required to consider the "public interest" before issuing the injunction. *Price*, 688 at 211.[9] The record indicates that Pennsylvania Court was fully aware of what type of business Pic-A-State was operating. More particularly, the court knew Pic-A-State's customers were from the general public. It is clear to us that the

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[7]The Pennsylvania Court noted that, in the absence of the injunction Pic-A-State's business would likely have suffered irreparable damage even if it prevailed on its challenge to the amendment. The reason Pic-A-State sought the injunction was that the revised code provisions placed Pic-A- State in the position that to protect its business, it had to continue operating while waiting for the court to decide the merits of its challenge. By operating, Pic-A-State risked criminal prosecution under the revised code sections in the event its challenge was unsuccessful. Alternatively, Pic-A-State could have shutdown to avoid the risk of criminal prosecution but, it very likely would have lost its business even if it prevailed on the constitutional challenge. The essential purpose of an injunction is relieve this type of dilemma.

[8]This explains why the Pennsylvania Court required no bond be posted by Pic-A-State.

[9]We further note that the TLC voiced no objection to accepting proceeds from Pic-A-State agents located in Texas for non winning lottery tickets.

public interest would hardly be served if Pic-A-State were allowed to transact business during the pendency of the injunction and its unsuspecting customers were denied the right to collect any benefit therefrom. We cannot believe the Pennsylvania Court, when deciding whether to issue the injunction, would have ignored something so obvious.

We also think it is significant that the DOJ made no further motions to lift the injunction and did not appeal the injunction to the Third Circuit. The Third Circuit considers a number of factors in reviewing the grant or denial of a preliminary injunction. Two of the factors which most pertinent to this case are: 1) the law has conferred power to grant or dissolve an injunction to the discretion of the trial court and not to the appellate court; 2) unless the trial court abuses its discretion, commits an obvious error in applying the law, or makes a serious mistake in considering the proof, the appellate court must take the judgment of the trial court as presumptively correct.[10] *A.O. Smith,* 530 F.2d at 525.

In short, we find nothing in the record to indicate that the injunction issued by the Pennsylvania Court was in any way wrongful. We also do not attach any significance to the fact that Pic-A-State did not ultimately prevail on the merits of its claim. The propriety of this injunction is determined by the circumstances in existence at the time it was issued, not after Pic-A- State's challenge was decided on the merits.

We are thus bound by the principles of comity and full faith and credit to respect the Pennsylvania Court's decision to issue the injunction and must conclude the injunction was correctly and

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[10]We note this only to point out that the government, having failed to show it would be harmed at the district court, likely could not make the requisite showing of obvious error or abuse of discretion to overcome the presumption the injunction was correctly issued. *A.O. Smith Corp. v. F.T.C.,* 530 F.2d 515, 525 (3rd Cir.1976).

legally issued. It is therefore, not within the authority of the Federal District Court for the Southern District of Texas or this Court to revisit the issue of whether the injunction was properly issued and conclude to the contrary.

B. Effect of the Injunction

It is well settled that the issuance of a prohibitory injunction freezes the status quo, and is intended "to preserve the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 1834, 68 L.Ed.2d 175 (1981). Preliminary injunctions commonly favor the status quo and seek to maintain things in their initial condition so far as possible until after a full hearing permits final relief to be fashioned. *Id.*; *Opticians Assoc. of Am. v. Independent Opticians of Am.*, 920 F.2d 187, 197 (3rd Cir.1990) (citations omitted). It follows that a district court issuing a temporary injunction upon the dissolution of a preliminary restraining order is acting to preserve the status quo. In this case, we have no doubt that Pic-A-State sought to maintain the status quo existing prior to the enactment of the Interstate Wagering Amendment[11] of the "Violent Crime Control and Law Enforcement Act of 1994".

There is no dispute that before Congress enacted the Violent Crime Control and Law Enforcement Act of 1994, Pick-A-State was a legal corporation, operating a legal business in over thirty states. Pic-A-State's operation enabled its customers to buy chances in the lotteries from the various lottery states without violating federal law. In light of the fact that Congress' enactment of Interstate Wagering Amendment would have outlawed Pic-A-State's business, it is obvious that Pic-A-State sought to preserve the pre-enactment status quo until the merits of its

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[11] 18 U.S.C. § 1301 et al. as amended.

constitutional challenge to the amendment could be heard.

Therefore, it is our opinion that: the injunction suspended the Interstate Wagering Amendment as applied to Pic-A-State; Pic-A-State's operations under the injunction were legal; and that obligations arising from Pic-A-State's operation are not unenforceable because of the Interstate Wagering Amendment of the "Violent Crime Control and Law Enforcement Act of 1994".

Finally, in summary, we find it incredible that the TLC urges us to adopt a position that sanctions the TLC's receipt of proceeds for the sale of its lottery tickets through Pic-A-State, and yet find that the TLC has no obligation to those unsuspecting patrons who provided it with such a benefit. For reasons already stated, Pic-A-State legally operated under the protection of the injunction and thus, had the right to collect fees for the service it provided. Pic-A-State benefitted by maintaining its business until its constitutional challenge to the Interstate Wagering Amendment could be heard. The TLC benefitted insofar as it received proceeds from the sales of its lottery tickets through Pic-A-State operations in all lottery states for the six months the injunction was effective. It may have also benefitted from not paying Wenner's claim.[12] Under the TLC's position, only the unsuspecting and unknowing Pic-A-State patrons, who paid the bill for the TLC's and Pic-A-

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[12]A perplexing question remains; What happened to the $10,000,000 jackpot that is the subject of this suit? Does the TLC still have it or was it rolled over into another jackpot? Since Wenner's ticket was undisputedly a winning ticket, did the TLC begin a new game with a minimum prize jackpot? The record gives no indication and the TLC's counsel was unable to provide any insight. Perhaps the trial court can sort this out on remand. We point out that the TLC may have accrued a considerable benefit by holding a prize of this magnitude or it may have earned a substantial benefit from additional ticket sales if the jackpot was eventually rolled over.

State's benefits, should be denied any chance to benefit.[13] We cannot subscribe to this wholly inequitable position.

In light of the foregoing, we conclude that the TLC was not entitled to a summary judgment as a matter of law and therefore, was not entitled to a summary judgment under Fed.R.Civ.P. 56(a). Accordingly, we vacate the district court's summary judgment and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

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[13]The TLC argued that while Pic-A-State was operating under the injunction, it had a duty to post a disclaimer that in effect notified its patrons that winning tickets would be unenforceable because of the Interstate Wagering Amendment. We find no authority for the proposition that a party who obtained an injunction to protect its interests while litigating its claim must then destroy its own interests through a such a self-inflicted wound.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
HOUSTON DIVISION

SCOTT WENNER,	§	
Plaintiff,	§	
	§	
v.	§	
	§	
TEXAS LOTTERY COMMISSION	§	
and ANTHONY SADBERRY,	§	CIVIL ACTION NO.
RICHARD DALY and JAN HART	§	H95-0552
in their capacities as commissioners,	§	
NORA A. LINARES, EXECUTIVE	§	
DIRECTOR, and LINDA CLOUD,	§	
Director of the Lottery Division,	§	
Defendants.	§	

FINAL JUDGMENT

For the reasons set forth in the Memorandum and Order signed by the Court this day, it is

ORDERED and ADJUDGED that Plaintiff Scott Wenner and Intervenors BDM Enterprises, Inc. d/b/a Hearts Discount Liquor take nothing on their claims against the Texas Lottery Commission, Anthony Sadberry, Richard Daly, Jar. Hart. Nora A. Linares, and Linda Cloud and Plaintiff's and Intervenors' causes of action are DISMISSED on the merits.

This is a FINAL JUDGMENT.

The Clerk will enter this Order. providing a correct copy to all counsel of record.

SIGNED at Houston, Texas, this 11th day of October, 1996.

/s/ EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
HOUSTON DIVISION

SCOTT WENNER,	§	
Plaintiff,	§	
	§	
v.	§	
	§	
TEXAS LOTTERY COMMISSION	§	
and ANTHONY SADBERRY,	§	CIVIL ACTION NO.
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in their capacities as commissioners,	§	
NORA A. LINARES, EXECUTIVE	§	
DIRECTOR, and LINDA CLOUD,	§	
Director of the Lottery Division,	§	
Defendants.	§	

MEMORANDUM AND ORDER

Pending are Defendants' Motion for Summary Judgment (Document No. 34), Plaintiff's Motion for Summary Judgment (Document No. 36), and Intervenor's Motion for Summary Judgment (Document No. 35). After having considered the parties' motions, briefs, and the applicable law, the Court concludes that Defendants' Motion should be GRANTED. Plaintiff and Intervenor's Motions are DENIED.

I. Background

The uncontroverted summary judgment evidence reveals the following: In mid-November, 1994,[1] Plaintiff Scott Wenner '("Wenner") purchased two Texas lottery tickets from a Pic-A-State retail outlet, located in a True Value Hardware store in Croyden, Pennsylvania. At the

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[1] None of the parties have designated a specific date upon which Wenner purchased form Pic-A-State in Pennsylvania two Texas lottery tickets. Wenner refers to the date as "shortly before November 23, 1994." Defendants refer to the date as "on or about November 23, 1994."

time, Pic-A-State was a Pennsylvania corporation with its principal place of business in New Jersey.[2] Pic-A-State engaged in the business of taking orders for, and purchasing, out-of state lottery tickets on behalf of its customers. Pic-A-State conducted its business in Pennsylvania through retail stores, at which customers placed orders for lottery tickets from other states Upon placement of the ticket order, the Pic-A-State retail outlet transmitted the information via its Pennsylvania computer terminal to its purchasing agents in the state where the relevant lottery was located. For its service, Pic-A-State charged a fee of $1.00 for each ticket order placed.

In return, the customer did not receive an actual lottery ticket, which remained in the state of purchase. Instead, Pic-A-State gave to its customer a receipt showing the numbers that the customer had selected. Thus, by leaving the actual tickets in the state of origin and transferring only a computer-generated "receipt to the customer, Pic-A-State's operations were designed to circumvent the federal statute, adopted in 1895, which prohibits the interstate traffic of lottery tickets. 18 U.S.C. § 1301.

In this case, Wenner paid to Pic-A-State $4.00 for the purchase of two $1.00 Texas Lottery Lotto tickets. Wenner selected six numbers for each game, and received from Pic-A-State a receipt generated in Pennsylvania which reflected the numbers Wenner had selected. The Pic-A-State outlet, located in the True Value Hardware Store in Pennsylvania, then transmitted Wenner's information via its Pennsylvania computer terminal to Hearts Discount Liquor ("Hearts Discount"), a liquor store in Harris County, Texas, which served as Pic-A-State's purchasing agent.

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[2] Pic-A-State has since abandoned its line of business because of the Interstate Wagering Aniendment to 18 D.S.C. § 1301, which prohibits the business *of* procuring for persons in one state an interest in a lottery conducted in another state. See Pic-A State Pa. Inc. v. Reno, 76 F.3d 1294, 1300 (3d Cir.), *cert. denied,* ___ U.S. ___, 116 5. Ct. 2504 (1996)

Pic-A-State had previously installed a computer and telephone line at Hearts Discount. Hearts Discount received wager information via the Pic-A-State computer which was copied to a computer disk. After Pic-A-State transmitted the numbers Wenner had selected in Pennsylvania, a third person picked up the computer disk from Hearts Discount. Thereafter, this person completed the playslip[3] and returned the playslip to Hearts Discount for processing.

On November 23, 1994, Texas Lotto Draw, No. 212 matched the numbers that Wenner had previously selected in Pennsylvania. After the Texas Lottery Commission published the winning numbers, Wenner timely filed a Texas Lottery Claim Form asserting his entitlement to the prize of approximately $10,000,000 arising out of the November 23, 1994 drawing. On January 13, 1995, the Commission rejected Wenner's claim and refused to pay him the winnings attributable to Texas Lotto Draw No. 212.[4]

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[3] A playslip is "[a]n optically readable card issued by the Texas Lottery used by players of Lotto Texas to select plays." TEX. ADMIN. CODE. tit.. 16 § 401.05(b)(4). There are five play boards on each play slip identified at A, B, C, D, and E. Id. The playslip has "no pecuniary value and shall not constitute evidence of ticket purchase or of numbers selected." Id.

[4] Linda Cloud ("Cloud"), the Director of the Lottery Division, Texas Lottery Commission, determined that Wenner was not entitled to the Texas Lottery Lotto jackpot for several reasons, including the violation of the Texas Lottery Statute and regulations. Regarding the particular transaction between Wenner and Pic-A-State, Cloud concluded:

a. Wenner's ticket was purchased over the telephone in violation of TEX. GOVT. CODE ANN. § 466.255.

b. Pic-A-State sold the ticket to Wenner at a price greater than that fixed by the Lottery division in violation of TEX. GOVT. CODE ANN. § 466.302; TEX. ADMIN. CODE tit. 16 §§ 401.304(b)(1), 401.305.

Wenner filed suit in the 234th Judicial District Court of Harris County, Texas. The Defendants timely removed to this Court. Wenner claims that he is entitled to declaratory judgment pursuant to 28 U.S.C. § 2201(a) and seeks a judgment from the Court that his ticket is valid,

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c. Pic-A-State is not a licensed retailer as required by TEX. GOVT. CODE ANN. §466.303. To be a valid winning ticket, the ticket must have been issued by an authorized on-line retailer, in an authorized manner on official Texas Lottery paper stock. TEX. ADMIN. CODE tit. 16 §§ 401.304(e)(1), 401.304(f)(1)(E). Hearts Discount violated these conditions because it did not issue tickets to Wenner in an authorized manner.

d. Pic-A-State sold Texas lottery tickets at a location other than the location of a sales agency in violation of TEX. GOVT. CODE ANN. § 466.304; TEX. ADMIN. CODE tit. 16 §§ 401.304(b)(1). Under Texas law, no part of the sale may take place away from the on-line terminal. A sale includes the exchange of consideration, the exchange of the playslip and the exchange of the on-line ticket. All elements of the sale occurred at a location other than the retailer's location in violation of TEX. ADMIN. CODE tit. 16 § 401.304(c)(2).

e. Pic-A-State offered to claim the prize of another person in violation of TEX. GOVT. CODE ANN. § 466.310.

f. Playslips which have been mechanically completed are not valid; Wenner's playslip was mechanically completed in violation of TEX. ADMIN. CODE tit. 16 § 401.305(f)(4).

g. Pic-A-State used interstate wire communications to place wagers in Texas. Pic-A-State knowingly transmitted in interstate commerce information which was used to procure lottery tickets in Texas.

and an order compelling Defendants to pay the winning proceeds from Lotto Draw No. 212 to Wenner, together with attorney's fees, prejudgment interest, and costs of court. In particular, Wenner alleges (1) breach of contract; (2) breach of statutory duty; (3) violations of the Equal Protection Clause contained in both the United States and Texas constitutions; and (4) violation of 42 U.S.C. § 1983. Wenner also asserts several so-called "affirmative defenses," including estoppel in pais, estoppel by negligence, estoppel by record, estoppel by laches, waiver, and quasi estoppel. Finally Wenner claims that he is a holder in due course because the lottery ticket is a bearer instrument.

In addition, Intervenor Hearts Discount seeks its one percent "seller's bonus" in the amount of $104, 654.44 as a result of "selling" the winning lotto ticket to Wenner.[5] Hearts Discount requests summary judgment regarding its claims for breach of contract and breach of statutory duty.

Defendants answered Wenner's Complaint and moved for summary judgment on the following grounds: (1) Wenner purchased his ticket in violation of federal law and, therefore, the alleged contract between Wenner and the Defendants is invalid and unenforceable; (2) Wenner's purchase of his lottery tickets involved multiple violations of Texas regulations and, therefore, does not create a valid, enforceable contract between Wenner and the Defendants; (3) Wenner failed to satisfy the conditions precedent to a valid contract, and, therefore, the contract never became binding upon the Defendants; (4) even if a contract was formed, the assertion of Wenner's claim against the state is barred by sovereign immunity; (5) Wenner was not discriminated against in violation of the equal protection clauses of the United State and Texas constitutions because he is not a member of a protected class; and (6) Hearts Discount's claims are derivative of Wenner's and, therefore, Hearts Discount, is likewise barred from recovering.

I. Discussion

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[5] Cloud also concluded that because Wenner was not entitled to the Texas Lottery Lotto jackpot, Hearts Discount was not entitled to its one percent retailer bonus.

A. The Summary Judgment Standard

Rule 56(c) provides that "[summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of informing the district court of the basis for the motion and identifying those portions of the pleading, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, which the moving party believes demonstrate the absence of a genuine issue of material fact. Celotex v. Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554 (1986).

Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. Id. At 2553-54. A party opposing a properly-supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing the existence of a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57, 106 S.Ct. 2505, 2514-15 (19986). Unsubstantiated assertions that a fact issue exists will not suffice. *See* Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1442 (5th Cir. 1993); Thomas v. Price, 975 F.2d 231, 235 (5th Cir. 1992). The nonmovant "must adduce admissible evidence which creates a fact issue concerning the existence of every essential component of that party's case." Krim, 989 F.2d at 1442.

In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. Anderson, 106 S.Ct. At 2513-14. All justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986). "If the record, viewed in this light, could not lead a rational trier of fact to find" for the nonmovant, summary judgment is proper. Kelley v. Price Macemon, Inc., 992 F.2d 1408, 1413 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 688 (1994) (citing Matsushita, 106 S.Ct. at 1351). On the other hand, if "the fact finder could reasonably find in [the

nonmovant's] favor, then summary judgment is improper." Id. (citing Anderson, 106 S.Ct. At 2511).

Finally, even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that "the better course would be to proceed to a full trial." Anderson, 106 S.Ct. At 2513. *Accord*, Veillon v. Exploration Services, Inc., 876 F.2d 1197, 1200 (5th Cir. 1989); 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2728 (1983).

B. The 1994 Interstate Wagering Amendment to 18 U.S.C. § 1301

As mentioned above, Congress enacted a prohibition upon interstate transportation of lottery tickets ("U.S. Lottery Statute") over a century ago. 18 U.S.C. § 1301.[6] The statute was most recently amended in 1994, when Congress passed the Interstate Wagering Amendment ("Wagering Amendment") as part of the Violent Crime Control and Law Enforcement act of 1994, Pub.L. No. 103.322 § 329905, 108 Stat. 2126, 2147. As amended, the U.S. Lottery Statute provides that, in addition to Section 1301's prohibition on the transfer in interstate commerce of any lottery ticket, any person who:

> [B]eing engaged in the business of procuring for a person in 1 State such a ticket, chance, share, or interest in a lottery, gift, enterprise or similar scheme conducted by another State (unless that business is permitted under an agreement between the States in question or appropriate authorities of those States), *knowingly transmits in interstate or foreign commerce information to be used for the purpose of procuring such a chance, share or interest*; . . . shall be fined not

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[6] Even before 1895 Congress had enacted laws excluding lottery tickets from the mails and prohibiting the importation of lottery matter from a broad. *See* Champion v. Ames, 188 U.S. 321, 354, 23 S.Ct. 321 (1903).

> more than $1,000 or imprisoned not more than two years, or both.

Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-322, § 320905, 108 Stat. 2126, 2147 (emphasis added). Thus the U.S. Lottery Statute now prohibits the procuring for persons in one state of an interest in a lottery conducted in another state, and prohibits the transmission of information to be used for the purpose of procuring a lottery ticket in another state.

The 1994 Wagering Amendment to the U.S. Lottery Statute "was explicitly intended to prohibit Pic-A-State's line of business." Pic-A-State Pa., Inc. v. Reno, 6 F.3d 1294, 1297 (3d Cir.), cert. Denied, 116 S.Ct. 2504 (1996). Senator Arlen Specter of Pennsylvania, who was the primary sponsor of the Wagering Amendment, explained that "current law prohibit[s] interstate transfer of lottery tickets . . . However, due to advances in communication technologies, current law does not accomplish its intended goals." Id. (Citing 139 Cong. Rec. S15247). According to Senator Specter, the Wagering Amendment was designed to close the loophole that allowed the "sale of interests in out-of-state lottery tickets via computer transaction with no paper crossing state lines." Id.

The 1994 Amendment to § 1301 was signed into law by the President on September 13, 1994. Because the bill did not specify a particular date for its becoming effective, it was effective immediately when the President signed it, September 13, 1994. Pope v. MCI Telecommunications Corp., 937 F.2d 258, 261 (5th Cir. 1991), *cert. denied,* 504 U.S. 916, 112 S. Ct. 1956 (1992); In re Shell Oil Co., 932 F.2d 1523, 1526 (5th Circ. 1991). Thus two months later, when Wenner made his purchase of Texas Lottery tickets in Pennsylvania, to be acquired for him by Pic-A-State through its interstate wire connections to a liquor store in Texas, federal penal law prohibited Pic-A-State from executing the transaction. A lottery ticket obtained by interstate wire transmission of information in violation of federal penal law cannot be enforced without sanctioning a violation of the federal penal law itself. Such contracts are ordinarily unenforceable. United States v. Mississippi Valley Co., 81 S.Ct. 294, 316, (1961) ("Were we to decree the enforcement of such a contract, we would be affirmatively

sanctioning the type of infected bargain which the statute outlaws and we would be depriving the public of the protection which Congress has conferred."); *see also* Comidisco, Inc. v. United States, 756 F.2d 569, 576 (7th Cir. 1985).

Wenner, however, contends that his purchase of the winning ticket in Pennsylvania through Pic-A-State's interstate wire connections to Texas did not transgress federal law because the statute's enforcement, when he purchased the ticket, had been enjoined temporarily by a United States District Judge in the Middle District of Pennsylvania. Indeed, three days after the amendment became law, Pic-A-State filed suit in the United States District Court for the Middle District of Pennsylvania (the "Pennsylvania District Court") seeking injunctive relief and a declaratory that the Amendment was unconstitutional. Pic-A-State v. Reno, No. 94-1490 (M.D. Pa. Sept. 16, 1994). On the date that the suit was filed, the district court signed an order enjoining the Unites States Attorney General, the United States Department of Justice, and the United States of America in pertinent part as follows:

> 1) Enforcement of the "interstate wagering" provision of the Violent Crime Control and Law Enforcement Act of 1994, . . . is stayed against the parties stated in ¶ 2 of this order until further action and order of this court.
>
> 2) Defendants shall not pursue any enforcement of the "interstate wagering" provision . . . against Plaintiffs [Pic-A-State and its owner, Scott McLean] and/or their officers, agents, dealers, retailers or employees, wherever located, until the captioned action is finally adjudicated.

Pic-A-State v. Reno, No. 94-1490 (M.D. Pa. Sept. 16, 1994). A little over five months later the Pennsylvania District Court set aside the preliminary injunction and dismissed Pic-A-State's complaint, finding no merit in any of its arguments. Pic-A-State v. Reno, No. 94-1490 (M.D. Pa. Feb. 23, 1995). This decision was affirmed by the United

States Court of Appeals for the Third Circuit. Pic-A-State v. Reno, 76 F.3d 1294, 1304 (3d Cir. 1996) ("The Amendment was a constitutional exercise of Congress' power to legislate under the Commerce Clause.").

Wenner argues that Pic-A-State's conduct was legal, giving rise to an enforceable lottery ticket contract with Defendants, because the statute was "not in force" during pendency of the preliminary injunction. This conclusion is not supported by the language contained in the Pennsylvania District Court's Order. Neither the district court nor any other court declared that the statute was "not in force." In what the district court itself later described as an order "narrowly drawn [and applicable] only to Plaintiffs in the instant case" (Order dated September 26, 1994), the district court simply ordered the Government not to "pursue any enforcement of the 'interstate Wagering' provision . . . against Plaintiffs . . . *until the captioned action is finally adjudicated.*" (Emphasis added). The district court did nothing more than to enjoin temporarily the Government's prosecution of Pic-A-State for its violations of the law.

Moreover, Wenner cites no authority for this argument that "the laws upon which the defendants rely . . . were not in force and effect as a consequence of the . . . federal injunction." Plaintiff's Brief, p. 16. Nor has the Court found any authority to support that view. Indeed, the argument is contrary to the basic equitable principles associated with the law on preliminary injunctions. The issuance of a preliminary injunction typically maintains the status quo pending a decision on the merits of a dispute. It does not itself entail a determination of the ultimate issues or rights involved. *See generally, 42 AM. JR. 2D Injunctions §§ 13-14* (1969) (citations omitted). To be sure, the preliminary injunction ordered by the Pennsylvania District Court did not adjudicate the substantive merits of Pic-A-State's claims and in no way purported to declare the statute unconstitutional or invalid.

It is fundamental that when one successfully moves for the issuance of a preliminary injunction, the movant thereafter acts at his own peril while under protection of the temporary order. For example, even in a civil matter an applicant may be adjudged liable for damages suffered by the restrained party during pendency of a wrongfully issued jurisdiction. It is for this reason, except where the United States is the

applicant, that security is required of an applicant before a restraining order or preliminary injunction may issue. FED. R. CIV. P. 65(c); Continuum Co., Inc. v. Incepts, Inc., 873 F.2d 801, 802 (5th Cir. 1989). A party has been wrongfully enjoined under Rule 65(c) if it is ultimately found that the enjoined party had at all times the right to do the enjoined act. Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 910 F.2d 1049, 19054 (2d Cir. 1990).

In this case, Pic-A-State obtained an injunction *temporarily* enjoining the United States from prosecuting it under the U.S. Lottery Statute. On the merits it was later determined that the United States at all times did have the legal right to prosecute Pic-A-State for its violations of the criminal law, and the preliminary injunction, therefore, had been wrongfully issued. Indeed, the courts uniformly have upheld the Wagering Amendment and the historic U.S. Lottery Statute as constitutional and enforceable. Pic-A-State v. Reno, 6 F.3d 1294, 1304 (3d Cir. 1996); Champion v. Ames, 188 U.S. 321, 354, 23 S.Ct. 321, 354, 23 S.Ct. 321 (1903). A wrongfully issued preliminary injunction restraining temporarily the prosecution of a penal statute does not render the statute itself invalid or "not in force," as argued by Wenner. Nor can an applicant which procured the wrongful issuance of the temporary injunction, claim to be absolved of its illegal activity committed during pendency of the wrongfully issued injunction. In other words, one cannot violate with impunity a penal statute of the United States simply by obtaining an order, wrongfully issued, that does nothing more than *temporarily* shield the applicant from prosecution of the applicant's criminal conduct.

Thus, Wenner's purchase of the Texas Lottery ticket was made through Pic-A-State's illegal interstate wire connections to Texas, prohibited by a Constitutional Act of Congress even though the United States had been *temporarily* enjoined from *prosecuting* Pic-A-State for the violation. As a result, Defendants have neither a contractual nor statutory duty to honor Wenner's "winning" ticket. *See* Southwestern Underground Supply & Envtl. Serv., Inc. v. Amerivac, Inc., 894 S.W.2d 15, 18 (Tex. App. — Houston [14th Dist.] 1994, writ denied) (a contract whose enforcement would necessarily violate a statute is illegal); First Texas Sav. Ass'n v. Dicker Ctr., 631 S.W.2d 179, 186 (Tex. App.-- Tyler 1982, no writ) (same); *see also* Crowder v. Benchmark Bank, 889

S.W.2d 525, 528 (Tex. App. — Dallas 1994, no writ) (citing Ben E. Keith Co. v. Lisle Todd Leasing, Inc., 734 S.W.2d 725, 727 (Tex. App. — Dallas 1987, writ ref'd n.r.e.)), *rev'd on other grounds* 919 S.W. 2d 657 (1996) (Texas courts do not enforce illegal contracts).

Defendants have also persuasively argued that Texas imposes many requirements for the lawful purchase of a Texas lottery ticket that also were violated by Wenner. These and Defendants' other stated grounds for summary judgment need not be considered, however, in view of the controlling effect of the federal Interstate Wagering Amendment which precludes enforcement of Wenner's lottery ticket.

For the reasons stated, Defendants' Motion for Summary Judgment is GRANTED. Wenner's Motion for Summary Judgment is DENIED. Hearts Discount's claims are derivative to Wenner's claims, and thus Hearts Discount's recovery is completely dependent on the merit of Wenner's case. Because Wenner's claims are without merit, Hearts Discount has not cognizable claims against Defendants. Therefore, Heart Discount's Motion for Summary Judgement is DENIED.

III. ORDER

For the foregoing reasons it is,

ORDERED that Defendants Texas Lottery Commission, Anthony Sadberry, Richard Daly, Jan Hart, Nora A. Linares, and Linda Cloud's Motion for Summary Judgment (Document No. 34) is GRANTED. Plaintiff's claims against Defendants are DISMISSED on the merits. It is further

ORDERED that Plaintiff Scott Wenner's Motion for Summary Judgment (Document No. 36) is DENIED. Intervenor's (BDM Enterprises, Inc. d/b/a Hearts Discount Liquor) Motion for Summary Judgment (Document No. 35) is also DENIED.

The Clerk shall notify all parties and provide them with a true copy of this Order.

SIGNED at Houston, Texas, on this 11th day of October, 1996.

/s/ EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

[Filed Nov. 10, 1997]

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 96-21074

SCOTT WENNER,
Plaintiff-Appellant,

and

BDM ENTERPRISES, INC.,
also known as Heart's Discount Liquor,
Intervenor Plaintiff-Appellant,

v.

TEXAS LOTTERY COMMISSION,
ANTHONY SADBERRY, RICHARD DALY, JAN HART,
NORA A. LINARES, AND LINDA CLOUD
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

Before DUHÉ and BARKSDALE, Circuit Judges, and COBB*, District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R.

APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

*District Judge of the Eastern District of Texas, sitting by designation.

STATUTE INVOLVED

18 U.S.C. § 1301:

> Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or, being engaged in the business of procuring for a person in 1 State such a ticket, chance, share, or interest in a lottery, gift, enterprise or similar scheme conducted by another State (unless that business is permitted under an agreement between the States in question or appropriate authorities of those States), knowingly transmits in interstate or foreign commerce information to be used for the purpose of procuring such a ticket, chance, share, or interest; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined under this title or imprisoned not more than two years, or both.

Supreme Court, U.S.
FILED
MAR 9 1998
CLERK

No. 97-1308

In The

Supreme Court of the United States

October Term, 1997

TEXAS LOTTERY COMMISSION et al.,

Petitioners,

v.

SCOTT WENNER et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT SCOTT WENNER'S BRIEF IN OPPOSITION

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RESPONDENT SCOTT WENNER'S BRIEF IN OPPOSITION

Respondent Scott Wenner (Wenner) respectfully requests that the Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

Wenner clarifies the following facts that have been misstated or incompletely stated by petitioners Texas Lottery Commission et al. (collectively referred to as the Commission).

A. The preliminary injunction allowed Pic-A-State to continue operating its business.

The Pennsylvania district court on September 26, 1994 issued a preliminary injunction staying enforcement of the Interstate Wagering Amendment, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320905, 108 Stat. 2126, 2147. (R. 1155-57). The Commission states that the preliminary injunction was "narrowly drawn," (Pet. 4), but omits other relevant terms of the injunction. The Pennsylvania district court only stated that the injunction was "narrowly drawn" in that it applied to Pic-A-State and not to similar businesses. (R. 1156).

The court also found that without the stay of the Interstate Wagering Amendment granted by the injunction, Pic-A-State would be "prohibited from operating their business, but more importantly, their entire business

would be destroyed." (R. 1156). Thus, the very purpose of the preliminary injunction was to permit Pic-A-State to continue its business.

The effect of the stay of the Interstate Wagering Amendment granted by the preliminary injunction was to preserve the status quo. (App. 7a, 11a). Maintaining the status quo would preserve the state of affairs existing prior to the enactment of the Interstate Wagering Amendment. It is undisputed that prior to the Interstate Wagering Amendment, Pic-A-State was operating legally. (App. 2a-4a). *See also Pic-A-State PA, Inc. v. Reno*, 76 F.3d 1294, 1297-98 (3d Cir.), *cert. denied*, 115 S. Ct. 2504 (1996). Maintaining the status quo must, therefore, have meant to make Pic-A-State's conduct during the stay the same as it was before the enactment of the Interstate Wagering Amendment–legal. As a result, Pic-A-State was permitted to operate and Wenner was permitted to not only purchase a lottery ticket from Pic-A-State, but also to win.

The Commission also implies that while Pic-A-State was protected by the stay of the enforcement of the Interstate Wagering Amendment, its customers such as Wenner were not. (Pet. 7, 8). But the express purpose of the stay was to permit Pic-A-State to continue operating its business. (R. 1155-57). If Pic-A-State's transactions with its customers were not protected by the preliminary injunction, then the injunction would have been a nullity.

Pic-A-State's conduct was protected by the stay and was, therefore, legal. As a result, there is no illegality to prevent enforcement of Wenner's contract with the Commission, his winning lottery ticket.

B. The Commission is not an innocent victim of Pic-A-State.

The Commission claims that "the Texas Lottery did not know it was receiving funds from Pic-A-State." (Pet. 6). This statement is patently false. The Commission has twice paid winning lottery tickets (5 out of 6 numbers) purchased by Pic-A-State at the very same location where Wenner's winning ticket was purchased, Heart's Liquors, and mailed the winning proceeds to Pic-A-State's corporate headquarters in New Jersey. (R. 415-16). The Commission also participated in the Pennsylvania litigation as amicus curiae against Pic-A-State. *See Pic-A-State PA, Inc. v. Pennsylvania*, 42 F.3d 175, 176 (3d Cir. 1994). The Commission further admitted that it was investigating Pic-A-State before Wenner purchased his winning ticket on November 23, 1994. (R. 763).

The Commission took no action, however, to notify its agent at Heart's Liquors not to deal with Pic-A-State. The Commission also did not try to prevent Pic-A-State's contributions to the Texas Lottery by the purchase of tickets. That is, until Wenner won.

The Commission also argues that, because Wenner is a police officer, he should be imputed with knowledge that the State of Pennsylvania has been claiming since 1991 that Pic-A-State's operations were illegal. (Pet. 6). This claim is incredible. First, the Commission apparently forgets that Pennsylvania's challenges prior to the passage of the Interstate Wagering Amendment were unsuccessful. *See Pic-A-State PA, Inc. v. Reno*, 76 F.3d 1294, 1297 (3d Cir.), *cert. denied*, 115 S. Ct. 2504 (1996); *Pic-A-State PA,*

Inc. v. Pennsylvania, 42 F.3d 175, 177 (3d Cir. 1994). Second, it strains credibility to argue that a citizen–a police officer or not–has constructive knowledge of two-month-old civil litigation in federal court in which there has not even been an opinion or published order issued. There is no evidence in the record that Wenner knew Pic-A-State's business was anything but legal.

REASONS WHY THE PETITION SHOULD BE DENIED

The Commission's eleventh-hour claims that the court of appeals' opinion conflicts with decisions of this Court and other circuits is transparent and does not warrant review by this Court. The alleged conflicts were never raised in the court below–because they in fact do not exist. The decision of the court of appeals is a correct application of the law to the unique facts presented.

I. The Court of Appeals' Opinion Does Not Conflict with this Court's Decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982).

The Commission argues that the court of appeals seemed to employ a balancing test in determining whether the contract was enforceable. (Pet. 6). The Commission further argues that the court of appeals' opinion somehow conflicts with this Court's decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982). (Pet. 5-6). The Commission is incorrect on both points.

First, the court of appeals did not apply a balancing test in its decision in this case. Rather, the court determined that the contract arising from the lottery ticket purchase was not illegal. (App. 7a). There is simply no basis in the record to support the Commission's claim that the court of appeals applied a balancing test.

Second, there is no conceivable conflict between the court of appeals' opinion and this Court's decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982). In *Kaiser Steel*, the lower courts held that even if the agreement in question was unlawful, the defense of illegality was not available. *Id.* at 76, 78-79. This Court granted Kaiser's petition for writ of certiorari and held that the lower courts erred in rejecting Kaiser's defense of illegality. *Id.* at 76-77, 78-79. This Court noted that it was well settled that "illegal promises will not be enforced in cases controlled by the federal law." *Id.* at 77 (discussing *McMullen v. Hoffman*, 174 U.S. 639 (1899), and *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227 (1909)).

The court of appeals' opinion in this case does not conflict with *Kaiser Steel*. The courts of appeals simply held that the contract in this case was not illegal. (App. 7a). It did not hold that the Commission's defense of illegality was unavailable or that an illegal contract is enforceable. Thus, the Commission's claim of a conflict with *Kaiser Steel* fails.

Finally, it should be noted that the Commission did not in the court below complain of the application of any balancing test, point out any alleged conflict with this Court's decision in *Kaiser Steel*, or even cite the *Kaiser*

Steel decision to the court. This Court should decline to review the Commission's belated claim of conflict.

II. The Court of Appeals' Opinion Does Not Conflict with the Decisions from the Second, Eighth, and Ninth Circuits.

The Commission now argues that the opinion of the Fifth Circuit in this case conflicts with decisions of the Second, Eighth, and Ninth Circuits. (Pet. 7, 10-11). This argument is also without merit.

The court of appeals in this case determined that the Pennsylvania district court properly issued the preliminary injunction against enforcement of the Interstate Wagering Amendment. (App. 7a, 10a). The court of appeals held that the injunction preserved the status quo and maintained the legality of Pic-A-State's activities while the injunction was in effect. (App. 7a, 9a-11a). The court's opinion does not conflict with the decisions of the Second, Eighth, and Ninth Circuits cited by the Commission.

The decisions cited by the Commission primarily deal with execution on security for injunctions under rule 65 of the Federal Rules of Civil Procedure and whether a party was "wrongfully enjoined" under that rule. Rule 65(c) provides:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper for the payment of such costs and damages as may be incurred or suffered by any

> party who is found to have been *wrongfully enjoined* or restrained.

FED. R. CIV. P. 65(c) (emphasis added). The case sub judice has nothing to do with rule 65(c) or the execution on security posted for an injunction. In fact, there was no bond required by the Pennsylvania district court for the temporary restraining order or preliminary injunction issued in this case. (App. 9a n.8).

In *Guzman v. Local 32B-32J, Serv. Employees Int'l Union, AFL-CIO*, 72 F.3d 260 (2d Cir. 1995), the Union was ordered to mail Guzman's campaign literature at Union expense. *Id.* at 262. The issue on appeal was whether the preliminary injunction was properly issued. *Id.* at 262-63. Because the mailing could not be undone, there was no longer any live controversy and the court dismissed the appeal as moot. *Id.* at 261, 262-63.

The Second Circuit in *Guzman* went on in dicta to discuss whether the Union had been wrongfully enjoined under rule 65(c) so that it could recover the mailing costs from Guzman. *Id.* at 263. The court was careful to distinguish between the issue of whether the district court exceeded its discretion in issuing the preliminary injunction and the issue of whether the party was wrongfully enjoined under rule 65(c). *Id; see also University of Tex. v. Camenisch*, 451 U.S. 390, 393 (1981) (significant difference between whether preliminary injunction should have issued and final resolution of merits of the case).

In *Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1032 (9th Cir.), *cert. denied*, 513 U.S. 822 (1994), Nintendo obtained a preliminary injunction against Galoob's sale of the Game Genie and was required to post a

$15 million bond as security for the injunction. *Id.* at 1034. Galoob, however, ultimately prevailed at the trial on the merits. *Id.* The district court vacated the preliminary injunction and, pursuant to rule 65(c), awarded Galoob the $15 million bond. *Id.* at 1034, 1036. The issue on appeal was whether Galoob was wrongfully enjoined under rule 65(c). *Id.* at 1036. The Ninth Circuit held that Galoob was wrongfully enjoined within the meaning of rule 65(c) because it had the right all along to do what it was enjoined from doing. *Id.* The court also noted that "[a] court that complies with the applicable law in issuing a preliminary injunction does not 'wrongfully' issue it." *Id.* at 1036 n.4.

In *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971), the carriers obtained a temporary restraining order enjoining the Interstate Commerce Commission's order canceling their then existing rates. *Id.* at 215. The carriers were later denied a preliminary injunction, and the court dissolved the temporary restraining order. *Id.* at 215, 217. The shippers sought restitution from the carriers for the shipping rates that were charged during the existence of the temporary restraining order because, had the ICC order gone into effect at the time planned, the rates would have been lower. *Id.* at 218. The Eighth Circuit held that the shippers were entitled to restitution because the remedy is available to persons who are injured by the restraint of an administrative order where the restraint was not warranted. *Id.* at 241-42. The court also noted that the restraint is only wrongful where the party who obtained its benefit is later found not to have been entitled to it or has failed to ultimately prevail on the merits;

this determination does not, however, mean that the district court acted improperly in granting a temporary restraining order or preliminary injunction. *Id.* at 241 n.4.

The court of appeals' decision in this case in no way conflicts with the Second Circuit's decision in *Guzman*, the Ninth Circuit's decision in *Nintendo*, or the Eighth Circuit's decision in *Middlewest Motor Freight*. This case has nothing to do with a party being wrongfully enjoined under rule 65(c), recovery against security posted for an injunction, or issues regarding restitution. There was no bond required in this case, (App. 9a n.8), and there is no claim for money damages as there was in those cases. Further, the Commission again failed to point out to the court below any alleged conflict with the Second, Eighth, or Ninth Circuits or even cite *Guzman*, *Nintendo*, or *Middlewest Motor Freight* to the court.

As the cases cited by the Commission demonstrate, the issue of whether a party is wrongfully enjoined under rule 65(c) is distinct from the issue of whether the court abused its discretion in issuing a preliminary injunction. *Guzman*, 72 F.3d at 263; *Nintendo*, 16 F.3d at 1036 n.4; *Middlewest Motor Freight*, 433 F.2d at 241 n.4; *see also University of Tex.*, 451 U.S. at 393. The court of appeals in this case specifically found that the preliminary injunction issued by the Pennsylvania district court was correctly and legally issued. (App. 10a-11a). The Commission has not challenged this determination.

The issue in this case is whether Pic-A-State's actions, taken under protection of a preliminary injunction that was later dissolved, are legal. (App. 7a-12a). The court of appeals correctly held that the preliminary injunction

preserved the status quo which existed prior to the enactment of the Interstate Wagering Amendment, thereby maintaining the legality of Pic-A-State's actions. (App. 7a).

The Commission asserts that it is unsettled in this Court whether a preliminary injunction, which is later dissolved, is a complete defense to civil or criminal penalties for actions taken during the pendency of the injunction. (Pet. at 7-8) (citing *Edgar v. MITE Corp.*, 457 U.S. 624 (1982)). The Court need not decide the issue in this case. There are no civil or criminal penalties at stake in this litigation. At issue is simply whether the stay of the Interstate Wagering Amendment granted by the preliminary injunction preserved the status quo.

Finally, this is a unique set of facts that is unlikely to recur. The Interstate Wagering Amendment has been declared constitutional. *Pic-A-State PA, Inc. v. Reno*, 76 F.3d 1294, 1304 (3d Cir.), *cert. denied*, 115 S. Ct. 2504 (1996). The Interstate Wagering Amendment was explicitly intended to prohibit Pic-A-State's line of business, *id.* at 1297, and has been successful in that effort: Pic-A-State has now gone out of business, *id.* at 1298. (App. 5a). It is, therefore, extremely unlikely that the factual scenario in this case will ever be presented again.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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March 9, 1998